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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT A. HESS, Defendant and Appellant.	A140442 (Alameda County Super. Ct. No. 171401)

Defendant Robert A. Hess pleaded guilty to the charge of continuous sexual abuse of a child under the age of 14 years.[1] On appeal, he contends the trial court improperly denied his request to withdraw his plea. He argues that his request should have been granted because the trial incorrectly advised him about the length of the mandatory parole term he is required to serve upon his release from prison. We reject his argument because, even though Hess was incorrectly advised, the record discloses no evidence upon which we could conclude he was prejudiced. We therefore affirm.

BACKGROUND

At the preliminary hearing, victim Jane Doe 1 testified Hess moved into her household during the summer between her fourth and fifth grades, when she was about eight or nine years old. She testified that on numerous occasions from then until August 2012, when she was 13 years old, Hess sexually molested her. Oakland Police Officer Bryant Ocampo also testified at the hearing, and he was asked about a September 2012

[1] Penal Code section 288.5, subdivision (a). Further statutory references are to the Penal Code unless otherwise specified.

interview taken of Jane Doe 1's younger sister, Jane Doe 2, at CALICO,[2] an organization that conducts forensic interviews with child victims of sexual abuse. Officer Ocampo testified that during the interview, Jane Doe 2 said Hess "put his thing" in her mouth.

The information accused Hess of continuous sexual abuse of a child (Jane Doe 1) between July 2009 and August 2012 (§ 288.5, subd. (a)) (first count); oral copulation of a person under 14 (Jane Doe 2) (§ 288a, subd. (c)(1) (second count); committing a sex crime against a child under 10 (Jane Doe 2) (§ 288.7, subd. (b)) (third count); and committing a lewd act upon a child (Jane Doe 2) (§ 288, subd. (a)) (fourth count). The information also alleged that the first through third counts were violent felonies within the meaning of sections 667.5, subdivision (c) and that the executed sentence for the offenses was required to be served in state prison under section 1170, subdivision (h)(3).

Before a jury was selected, the court held a hearing to consider motions in limine. In the first motion, the People sought to admit Jane Doe 2's statement made during the CALICO interview under Evidence Code section 1360 [governing statements describing an act of child abuse]. A child interview specialist who conducted the interview, Bertha Navarez, was called to testify, and the prosecutor played a video recording of the interview. Navarez then testified that Jane Doe 2 was four years old at the time of the interview and was able to identify body parts using visual aids and drawings, by pointing to a penis on a drawing, and by referring to the penis as the "thing" and "nuts." Navarez testified that, based on her experience, Jane Doe 2 had a "knowledge of male body parts that is not normal for a four year old to have." Navarez further testified that Jane Doe 2 was able to identify Hess as the person who "did these things to her" and testified that there was no reason "why she would make something up."

After Navarez completed her testimony, Jane Doe 2 took the stand so the court could assess her competency to testify at trial. She told the court she was five years old and answered questions by the court, the prosecutor, and defense counsel. The court

[2] CALICO is an acronym for the Child Abuse Listening, Interviewing and Coordination Center.

found that Jane Doe 2 was competent to testify at trial because she "has the ability to communicate and she understands the duty to tell the truth." Following this determination, the court ruled that the CALICO statement could be admitted into evidence under Evidence Code section 1360 after Jane Doe 2 testified at trial.

In another motion in limine, the People sought to admit evidence of other sexual offenses by Hess under Evidence Code 1108. This evidence included an allegation by a third victim that Hess had forcibly raped her 30 years ago in 1983 when she was 13 or 14 years old and Hess was 17 or 18 years old. After entertaining argument of counsel, the court ruled that evidence of the 1983 alleged rape was inadmissible under Evidence Code section 1108. The court also ruled that the People were prohibited from using the evidence for impeachment purposes unless the defendant testified and "open[ed] the door for any relevancy of that evidence to come in."

Immediately before jury selection was to begin, the parties announced a resolution of the case. The prosecutor recited the pertinent terms of the plea agreement as follows: Hess would plead guilty to continuous sexual abuse of Jane Doe 1 under count one, with a mid-term sentence of 12 years in prison at 85 percent[3] and a lifetime sex-offender-registration requirement. After the prosecutor recited the terms of the plea agreement, defense counsel inquired about parole, and the court stated "it would be a seven year parole period." The court then advised Hess of his constitutional rights, and Hess pleaded no contest to the charge of continuous sexual abuse of Jane Doe 1. The parties stipulated that the evidence presented at the preliminary hearing constituted the factual basis for the plea. The court found that Hess freely, knowingly, and voluntarily waived his constitutional rights, accepted the plea, and found Hess guilty on the first count of the

[3] A trial court must impose a 15 percent limitation on a defendant's accrual of post-sentence conduct credit if the defendant is convicted of a violent felony as defined under section 667.5, subdivision (c). (See § 2933.1, subd. (a).) Continuous sexual abuse of a child, in violation of section 288.5, is one of the offenses specified as a violent felony. (See § 667.5, subd. (c)(16).)

information. The court then dismissed the second, third, and fourth counts under the plea bargain and set the matter for sentencing.

While awaiting sentencing, Hess wrote to the trial court judge stating he was not "completely advised of all my rights prior to entering my plea and my decision was made without full knowledge of the ramification of such a plea. Additionally, I do not believe my counsel . . . advised me of all my rights and my decision to accept the plea in this case was done so with incomplete information and legal advice of counsel. [¶] Please consider this letter my official request to withdraw my plea and proceed to trial."

The trial court held a hearing to consider Hess's request to withdraw his plea. At the hearing, Hess stated that he "would like to go forward due to the fact . . . I want to be fully heard. . . . I want my constitutional rights to be afforded to me." Hess further complained he felt he had not "been fairly represented" and stated "things could have been done to give me better representation to build a better case, and then also explain to me in totality besides just saying, Mr. Hess, I don't want to see you go to prison for life, take the deal. That was basically the defense [my attorney] gave me."

When Hess complained about his dissatisfaction with his attorney's representation, the trial court closed the open-session hearing to consider whether Hess should be relieved of his counsel under *People v. Marsden* (1970) 2 Cal.3d 118. The court asked Hess, "[W]hat is it now about what [counsel] did or didn't do that you believe justifies a good cause finding . . . to allow you to withdraw the plea? . . . [G]ive me the reasons." Hess complained that his counsel delayed interviewing witnesses, did not interview Jane Doe 2, and did not inform him about the 1983 rape allegation until shortly before trial. In response, Hess's counsel stated that, although he was informed of the 1983 rape allegation when he entered the case, he did not address it until the prosecutor provided formal discovery about it as trial approached. He also stated that he investigated the issue and talked to a number of witnesses Hess had identified, but none was helpful. He pointed out that, in any event, he was successful in excluding evidence of the 1983 rape allegation. He also stated he told Hess he had subpoenaed numerous character witnesses to testify at trial, including children of Hess's long-time friends who were prepared to

testify that they had spent time with Hess when they were young, and Hess "never did anything untoward against them." Counsel finally remarked that before advising Hess regarding settlement, he had wanted to see how the court ruled on whether Jane Doe 2 was competent to testify.

After hearing "sufficient information from Mr. Hess" over the course of an hour-long hearing, the court resumed the open-session hearing on Hess's request to withdraw his plea. The court then denied the request for lack of good cause. The court found Hess "was fully informed of all of the consequences of this plea . . . . [¶] The most he is saying is that now that he's really had more time to think about it, . . . he wants to go forward. He doesn't want to take the plea. He wants to be heard, and has cited areas of [counsel's] performance. . . . [¶] So everything [Hess] is talking about occurred before the plea was even taken. . . . The court finds that nothing [Hess] has said indicates the inability for this defendant to act with free will on [his plea date]. . . . [¶] [N]othing [] causes me to believe that he did not knowingly, voluntarily, and intelligently waive every right and enter into the plea. . . ."

At the sentencing hearing, Hess attempted to renew his motion to withdraw the plea on the ground he was not advised he could testify at the preliminary hearing, but the court declined to entertain the motion. Thereafter, Hess took the stand to testify under oath in mitigation. After he did so, the court ruled that Hess would be sentenced "in accordance with the terms of the sentencing agreement," which the court found to be in the interest of justice because the child victims would not have to testify at trial. The court then sentenced Hess to the midterm of 12 years to be served at 85 per cent. The court also ordered Hess to register as a sex offender for life under section 290 and upon release from state prison "to serve a period of parole of 20 years and 6 months."

After the court completed the pronouncement of sentence, the following colloquy ensued:

> [DEFENSE COUNSEL]: Your Honor, I do have a question about the parole period. I think the court indicated a 20-year parole period.

THE COURT: By law it is 20 years.

[DEFENSE COUNSEL]: I am not sure we were advised of that in the change of plea.

THE COURT: Okay. Anything else?

. . .

[DEFENSE COUNSEL]: I believe in the change of plea it was indicated to be about a seven-year top.

. . .

That was my understanding. . . . I would ask the Court to consider having the parole period no longer than seven years at this point.

THE COURT: No. The Court will stick with what the law requires in this.

. . .

Thank you. Denied. The defendant is remanded into the custody of the Sheriff of the Alameda County to serve this sentence.

Neither Hess nor his attorney objected any further to the parole term, and no alternative relief was requested. Hess subsequently filed a notice of appeal with a request for a certificate of probable cause, but he did not argue that the imposition of the parole term was improper. Instead, he stated, "Trial court erroneously denied my *Marsden* motion and motion to withdraw my no contest plea based on ineffective assistance of counsel. I did not receive effective assistance of counsel in this case in violation of my state and federal constitutional right to counsel." The trial court granted the request for a certificate of probable cause.[4]

DISCUSSION

Hess maintains that the trial court misadvised him about a direct consequence of his plea by telling him he would face a seven-year parole term at the time of the plea instead of the mandatory 20-year-and-six-month parole term that was imposed at

[4] Section 1237.5 allows appeals of guilty pleas when such a certificate is executed and filed.

sentencing.[5] Hess insists that as a result his plea was not knowing, intelligent, and voluntary[6] and that he was prejudiced by the court's error because he would not have pleaded guilty if the trial court had correctly advised him.[7]

Respondent acknowledges that "a mandatory term of parole is a 'direct consequence' of a plea and thus a matter of which a trial court is obligated to advise a defendant." (*In re Moser* (1993) 6 Cal.4th 342, 351-352 (*Moser*). Respondent also concedes that the trial court did not advise Hess of the correct parole term at the time of the plea. Nevertheless, respondent asserts the plea cannot be declared invalid because Hess was not prejudiced by the misadvisement. We agree that the record before us reveals no evidence upon which we could conclude that Hess was prejudiced.

In considering a challenge to the validity of a plea bargain, we bear in mind "two related but distinct legal principles." (*People v. McClellan* (1993) 6 Cal.4th 367, 375 (*McClellan*).) "The first principle concerns the necessary advisements whenever a

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[5] Section 3000 provides in pertinent part: "[I]n the case of a person convicted of and required to register as a sex offender for the commission of an offense specified in Section 261, 262, 264.1, 286, 288a, paragraph (1) of subdivision (b) of Section 288, Section 288.5, or 289, in which one or more of the victims of the offense was a child under 14 years of age, the period of parole shall be 20 years and 6 months unless the board, for good cause, determines that the person will be retained on parole." (§ 3000, subd. (b)(4)(A).)

[6] This was not the ground for appeal stated in Hess's request for a certificate of probable cause. But a defendant may raise any certifiable issue on appeal having obtained a certificate of probable cause. (See *People v. Hoffard* (1995) 10 Cal.4th 1170, 1176-1179 [concluding that on appeal from a conviction based on a guilty plea, the appellate court may entertain cognizable claims not identified in defendant's statement of grounds and trial court's certificate of probable cause].)

[7] Respondent asserts that Hess forfeited this claim because he failed to renew his motion to withdraw the plea after the court announced the statutorily mandated parole term. However, in a related petition for writ of habeas corpus filed in *In re Hess,* case No. A142338, Hess seeks habeas relief on the grounds trial counsel provided ineffective assistance by failing to advise him of the mandatory 20-year-and-six-month parole term and by failing to renew the motion to withdraw plea after the court imposed the mandatory parole term at sentencing. Concurrently with this opinion, and after having solicited informal briefing from the parties, we file a separate order denying the petition for writ of habeas corpus on the ground it fails to state a prima facie case for relief.

defendant pleads guilty. . . . The defendant must be admonished of and waive his constitutional rights. [Citations.] In addition, . . . the defendant must be advised of the direct consequences of the plea. [Citation.] The second principle is that the parties must adhere to the terms of a plea bargain. [Citation.]"[8] (*Ibid.*)

As to the first principle, the Supreme Court has held that a defendant who pleads guilty must be advised of the direct consequences of the plea. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605.) And in *Moser, supra,* 6 Cal.4th 342, the Court held that "where the trial court fails to advise a defendant of the mandatory parole consequences of his or her guilty plea or, . . . misadvises a defendant as to those consequences, *Bunnell* error has occurred." (*Id.* at p. 352.)

Here, there is no question that Hess was misadvised at the plea hearing about the applicable parole term. But this does not mean he is automatically entitled to withdraw his plea. As the Court held in *McClellan,* " 'a defendant (even on direct appeal) is entitled to relief based upon a trial court's misadvisement only if the defendant establishes that he or she was prejudiced by the misadvisement, i.e., that the defendant would not have entered the plea of guilty had the trial court given a proper advisement. [Citation.]' " (6 Cal.4th at p. 378 quoting *Moser, supra,* 6 Cal.4th at p. 352 [defendant must demonstrate prejudice to withdraw a plea based on the trial court's misadvisement regarding the applicable parole term].) Moreover, prejudice is not established by a defendant's mere assertion that the plea would have been rejected if he or she had been given a correct advisement. (See *McClellan, supra,* 6 Cal.4th at p. 378.) Rather, any such assertion must find clear support in the record. (*Ibid.*)

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[8] The second principle is not implicated here because Hess does not assert that imposition of the statutorily-mandated term of probation constituted a violation of the plea agreement. Nor did it. The length of a parole term "is *not* a permissible subject of plea negotiations" and the record shows it was "not encompassed by the parties' plea negotiations" in this case. (*Moser, supra,* 6 Cal.4th at p. 357, original italics.) In short, this appeal solely concerns a violation of the "trial court's advisement duty" not a violation of the terms of plea bargain (*Id.* at p. 353).

We must, therefore, turn to the record to determine whether it reveals that Hess would not have taken the plea if he had known about the 20-year-and-six-month parole period. We conclude that it does not.

At the conclusion of the in-limine motions hearing held on September 23, 2013, the prosecutor stated, "At this point I'm still willing to allow 12 years to sit on the table. To be specific, it's the mid-term 288.5 Count One. That would involve a 290 registration and it's an 85 percent time case." Defense counsel replied that he had "passed that along and some other ideas . . . but *we do note there's a deadline tomorrow morning.*" (Italics added.) The deadline was because jury selection was scheduled to begin the next day. On the morning of September 24, defense counsel initially enquired whether "[w]e can get to eight years on one count of 288(a), and my client is asking if the District Attorney . . . would consider that offer for . . . resolution." The prosecutor responded that "the only offer I have at this point is the 12 years mid term, Count 1," and the court then stated to defense counsel, "so it seems to me that if the defendant is inclined to want to settle, he just needs to settle, or we'll bring this jury in here. Simple as that." Defense counsel then expressed Hess's concern that he "could be eligible for an SVP petition, sexually violent predator petition, at the end of his prison term. . . . He wants to know if the Court can shed light on that area of law." After the prosecutor explained the "basic process" involved in qualifying a defendant as a sexually violent predator, the court reiterated that "the real issue is, at this point, whether you want to resolve this on the basis stated by the DA, or whether you wish to exercise your right to a jury trial, understanding that if you are convicted, minimally of Count 3, then it's a life sentence." After the court called a brief recess so Hess could confer with counsel regarding the plea offer, Hess decided to accept it.

Nothing in this record supports a conclusion that Hess would have rejected the plea offer if he had been properly advised of the correct parole term. The prosecutor had offered the plea bargain some time before the hearing on in-limine motions and reiterated it at the hearing's conclusion after key rulings had gone in the prosecution's favor. Hess accepted the offer the day after the court ruled that Jane Doe 2 was competent to testify

and that her CALICO statement could be admitted into evidence with a proper foundation. At the time Hess accepted the plea, he was facing a strong possibility of a life sentence, his counteroffer of an eight-year sentence had been rejected, he knew he would have to register as a sex-offender for life, and he knew there was a possibility of being designated a sexually violent predator upon completion of his sentence. In light of the severity of the penalties facing Hess, we cannot conclude, without more, that Hess has established that he would have rejected the plea deal if he had known about the correct term of parole.

Furthermore, when the court imposed the statutorily required 20-year-and-six-month parole term at sentencing, Hess said nothing about it to the court (or to his counsel, so far as we know), and he did not assert that he was entitled to have his plea withdrawn on that basis. Instead, he simply requested through his counsel that the parole term be reduced to seven years, a request the trial court properly found could not be granted. And later, when Hess requested a certificate of probable cause to appeal the denial of his request to withdraw his plea, he did not argue that the request should be granted because of the parole misadvisement. Instead, he contended the trial court "erroneously denied my *Marsden* motion and motion to withdraw my no contest plea based on ineffective assistance of counsel." In other words, the request was based on events and rulings before the court imposed the sentence with the statutorily mandated parole term. This provides some reason to believe that the court's misadvisement of the parole term was not significant in the context of Hess's plea agreement. (Cf. *McClellan, supra,* 6 Cal.4th at p. 378 [noting "defendant's failure to object at the sentencing hearing suggests that he did not consider the [sex offender] registration requirement significant in the context of his plea agreement"].)

We conclude that the record before us does not support Hess's assertion that he was prejudiced by the trial court's misadvisement about the applicable parole term.

DISPOSITION

The judgment is affirmed.

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Humes, P.J.

We concur:

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Margulies, J.

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Dondero, J.